FOR ARGUMENT

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Supreme Court of the United States

October Term 1979
No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

APPELLANTS' REPLY BRIEF.

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SUBJECT INDEX

Page

Introduction 1

1.

Preliminary Observations on Arguments of Appellee and Its Amici 4

A. Appellants Contend That It Was Error for the Court Below to Promulgate the Absolutist Dogma That Just Compensation Is Never Available for Regulatory Takings; the Converse Arguments Ascribed to Them Are Spurious 5

B. Large Judgments Can Threaten Only if the Constitution Is Being Violated on a Large Scale; if so, All the More Reason for This Court's Corrective Intervention 8

C. The Invalidation "Remedy" Is de Facto Not Available in California 12

D. The Professed Nobility of Appellee's Asserted Goals Does Not Justify the Use of Unconstitutional Means 16

E. By Claiming That it Cannot Tell When it Violates the Constitution Appellee Contradicts the Basis of its Central Argument 18

F. Appellee's Notion of "Chilling" Stands American Constitutional Jurisprudence on its Head, by Demanding That Constitutional Violators Be Favored 19

G. Appellee's Arguments Ignore the Concept of Fairness That Is the Cornerstone of the Constitution 21

Page

2.

The Opinion Below Squarely Deals With the Constitutional Issues of Takings and Remedies, and Expressly Belies Appellee's "Administrative Remedies" Arguments 22

3.

The Present Record Makes It Clear That the Subject Property Has Been Rendered Useless and Worthless; Any Factual Controversy on That Point That Appellee Wishes To Pursue Should Be Raised in a Trial on the Merits 23

4.

The Nature of Property and the Effect of Regulations on it Lead to the Conclusion That a "Taking" Need Not Encompass the Entire Fee Simple Absolute Title, But May Involve Only the Taking of a Particular Property Right, With Just Compensation Awarded Accordingly 26

5.

The Case at Bench Provides an Opportunity to Strike a Balance Between the Public Interest and Environmentalist Zealotry 33

Conclusion 34

TABLE OF AUTHORITIES CITED

Cases Page

Arastra Limited Partnership v. City of Palo Alto, 401 F.Supp. 962 (1975, N.D. Cal.) 417 F.Supp. 1125 ..... 25, 28, 29

Armstrong v. U.S., 364 U.S. 40 (1960) 33

Askew v. Gables-by-the-Sea, 33 So.2d 56 (1976, Fla.App.) 6

Benenson v. U.S., 548 F.2d 939 (1977, Ct.Cl.) 28

Berman v. Parker, 348 U.S. 26 (1954) 33

Boston Chamber of Commerce v. Boston, 217 U.S. 189 (1910) 28

Brock v. Superior Court (1952) 109 Cal.App.2d 594, 241 P.2d 283 22

Buchanan v. Warley, 245 U.S. 60 917) 30

Butz v. Economou, 438 U.S. 478 (1978) 7

Bydlon v. U.S., 175 F.Supp. 891 (1959, Ct.Cl.) 28

City of Austin v. Teague, 570 S.W.2d 389 (1978, Tex.) 29

City of East Lake v. Forest City Enterprises, 426 U.S. 668 (1976) 22

Clifton v. Berry, 259 S.E.2d 35 (1979, Ga.) 7

Commissioner of Natural Resources v. S. Volpe & Co., 206 N.E.2d 666 (1965, Mass.) 17

County of Los Angeles v. Berk, 26 Cal.3d 201, ... Cal.Rptr. ..., ... P.2d ... (1980) 5

Dahl v. City of Palo Alto, 372 F.Supp. 647 (1974, N.D. Cal.) 23

Damico v. California, 389 U.S. 416 (1967) 23

Davis v. Passman ... U.S. ..., 99 S.Ct. 2264 (1979) 8, 9

Page

Davis v. Wechsler, 263 U.S. 22 (1923) 4

Drakes Bay Land Co. v. U.S., 424 F.2d 574 (1970, Ct.Cl.) and 459 F.2d 504 (1972, Ct.Cl.) 28

Eck v. City of Bismark, 283 N.W.2d 193 6

Estuary Properties, Inc. v. Askew, ... So.2d ... (1979, Fla.App.) 6, 31

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 24, 33

Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976) 6

Frisco Land & Mining Co. v. State, 74 Cal.App.3d 736, 141 Cal.Rptr. 820 (1977) 5

Furey v. City of Sacramento, 24 Cal.3d 862, 157 Cal.Rptr. 684, 598 P.2d 844 (1979) 12

Gates v. Collier, 501 F.2d 1291 (1974, 5th Cir.) 11

Gerlach Live Stock Co. v. U.S., 339 U.S. 725 (1950) 33

Gordon v. City of Warren, 579 F.2d 386 (1978, 6th Cir.) 30, 31

Hermanson v. Board of County Comm'rs, etc., 595 P.2d 694 (1979, Colo.App.) 7

Hillside Water Co. v. City of Los Angeles, 10 Cal.2d 677, 76 P.2d 681 (1938) 4

Hollister Park Investment Co. v. Goleta County Water Dist., 82 Cal.App.3d 290, 147 Cal.Rptr. 91 (1978) 5

Hamer v. Town of Ross, 59 Cal.2d 776, 31 Cal.Rptr. 335, 283 P.2d 376 (1963) 12

Hughes v. Washington, 389 U.S. 290 (1967) 4

International Paper Co. v. United States, 282 U.S. 399 (1930) 19

Page

Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1978) 5, 7

Jones v. People, 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165 (1978) 30

Kaiser Aetna v. United States, ... U.S. ..., 100 S.Ct. 383 (1979) 32, 35

Keystone Associates v. State, 333 N.Y.S.2d 27 (1972, App.Div.) aff'd. 307 N.E.2d 254 (1973, N.Y.) ... 31

Keystone Associates v. State, 371 N.Y.S.2d 814 (1975, Ct.Cl.) rev'd. 389 N.Y.S.2d 895 (1976, App.Div.) rev'd. and remanded 45 N.Y.2d 894, 383 N.E.2d 560 (1978, N.Y.) 29

Kimball Laundry Co. v. United States, 338 U.S. 1 (1948) 28

Klopping v. City of Whittier, 8 Cal.3d 39, 164 Cal.Rptr. 1, 500 P.2d 1345 (1972) 5

Lake County Estates v. Tahoe Regional Planning Agency, ... U.S. ..., 59 L.Ed.2d 401 (1979) 6, 7, 23

Lomarch Corp. v. City of Englewood, 237 A.2d 81 (1968, N.J.) 29

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 20

Macallen v. Massachusetts, 279 U.S. 620 (1929) 17

Marbury v. Madison, 1 Cr. (5 U.S.) 137 (1803) 10

Moore v. East Cleveland, 431 U.S. 494 23

Moviematic Industries Inc. v. Dade County, 249 So.2d 667 (1977, Fla.App.) 6

Nectow v. Cambridge, 277 U.S. 183 (1928) 3, 25

Orsetti v. Fremont, 80 Cal.App.3d 961, 146 Cal.Rptr. 75 (1978) 5

Page

Peacock v. County of Sacramento, 271 Cal.App.2d 848, 77 Cal.Rptr. 391 (1969) 28

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 2, 35

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 33

Pete v. U.S. 531 F.2d 1018 (1976, Ct.Cl.), and 569 F.2d 565 (1978, Ct.Cl.) 28

Portsmouth Harbor L. & H. Co. v. United States, 260 U.S. 327 (1922) 26

Raley v. Calif. Tahoe Regional Planning Agency, 68 Cal.App.3d 965, 137 Cal.Rptr. 699 (1977) 15, 16, 27

Richmond Elks Hall Assn. v. Richmond Redevelopment Agency, 561 F.2d 1327 (1977, 9th Cir.) 29

San Antonio River Authority v. Garrett Bros., 528 S.W.2d 266 (1975, Tex. Civ. App.) 30

San Diego Bldg. Contractors Assn. v. City Council, 13 Cal.3d 205, 118 Cal.Rptr. 146, 529 P.2d 570 (1974) 22

Sauer v. New York, 206 U.S. 536, (1907) 30

Sixth Camden Corp. v. Township of Evesham, 420 F.Supp. 709 (1976, D.N.J.) 31

Sneed v. County of Riverside, 218 Cal.App.2d 205, 32 Cal.Rptr. 318 (1963) 29

State v. Superior Court (Veta) 12 Cal.3d 237, 115 Cal.Rptr. 497, 524 P.2d 1281 (1974) 3, 24

Strumsky v. San Diego County etc. (1974) 11 Cal.3d 28, 112 Cal.Rptr. 805, 520 P.2d 29 22

Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474 2

Page

United States v. Causby, 328 U.S. 256 (1946) 29

United States ex rel. TVA v. Powelson, 319 U.S. 266 (1943) 30, 31

United States v. General Motors Corp., 323 U.S. 373 (1943) 28

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 16, 17, 18

Washington Market Enterprises, Inc. v. City of Trenton, 343 A.2d 408 (1975, N.J.) 30

Watson v. Memphis, 373 U.S. 526 (1963) 11

Wulzen v. Board of Supervisors (1894) 101 Cal. 15, 35 P. 353 22

Statutes

California Civil Code, Sec. 654 30

California Code of Civil Procedure, Sec. 452 2

California Code of Civil Procedure, Sec. 1094.5 22

California Constitution, Art.I, Sec. 1 21

California Government Code, Sec. 6953 31

California Streets & Highways Code, Sec. 5503 12

United States Code, Title 42, Sec. 1983 ..... 7, 23

United States Constitution, Fifth Amendment 24

United States Constitution, Fourteenth Amendment ... 30

Textbooks

American Bar Association, Code of Professional Responsibility, Canon 7, Ethical Consideration, pp. 7-14 13

Annotation: 1 A.L.R. Fed. 479 30

Comment, Developments in the Law: Zoning, 91 Harv. L.Rev. pp. 1429, 1492 21

25 Hastings Law Journal, Comment, p. 1165 15

Page

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Note: De Facto Takings and the Pursuit of Just Compensation, 48 Fordham L. Rev. (1948) p. 334 6

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APPELLANTS' REPLY BRIEF.

Introduction.

The basic strategy of Appellee and most of its *amici* is to treat this controversy not quite as it factually is but to assume that what is in issue here is "pure" regulation; *i.e.*, a regulatory enactment unaccompanied by any governmental acquisitory purpose or activities. To that end the record reflecting the Appellee's plans, studies, announcements and appropriations, specifically and avowedly aimed at acquisition of the subject property as an "indispensable" part of city-owned open space, as well as the on-again, off-again condemnation, and their *combined* impact on the utility and value of the subject property are virtually disregarded.

Put another way, Appellee and friends simply ignore Appellants' arguments presented in Appellants' Brief at pp. 26-30. More importantly, they likewise ignore this Court's

analysis of taking criteria enumerated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 128 (1978), and emphasizing that governmental actions that may be characterized as acquisitions of resources constitute a factor of peculiar significance in the highly fact-dependent inquiry as to whether a taking has occurred. In contrast, in Appellee's hands this important factor is treated as if it had no significance or did not exist.[1]

Therefore, Appellants must note at the outset that virtually all of the arguments of Appellee and friends are based on a factually deficient premise. What is alleged here is a *de facto* deprivation of *all* utility and value of the subject property brought about by the totality of Appellee's *entire* course of conduct. Unless these facts are kept in mind (as they must be, this being a case of dismissal following a general demurrer), the pertinent legal principles cannot be properly applied, and no amount of arguments going to abstract legal concepts or invoking public policy can make up for the crucial failing of not dealing candidly with *all* the facts of *this* case. To that extent, virtually all legal arguments pre-

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[1]To be sure, the Solicitor General (Brief of the United States, at pp. 21-22, fn.11) strives to gloss over this issue in a lengthy footnote. Unfortunately, that argument does not address the *cumulative* totality of *all* of Appellee's activities and their *combined* impact on the subject property (nor can it, that being a clear issue of fact that cannot be honestly dealt with, absent evidence and consideration of factual inferences). Rather, that argument exemplifies so-called "salami tactics"; *i.e.*, it evades the issue by attempting to separate it into pieces, and then addressing one piece at a time as if the others did not exist. That ingenious approach cannot be squared with this Court's commitment to case-by-case adjudication of the peculiar facts of each individual case. Moreover, under California law (this being an appeal from a dismissal following the sustaining of a general demurrer without leave to amend as to the inverse condemnation cause of action) the allegations of the Appellants' complaint must be liberally construed, and all reasonable inferences, favorable to the pleader indulged in. Cal. Code of Civil Procedure §452. *Terry Trading Corp v. Barsky*, 210 Cal. 428, 438, 292 P. 474.

sented by Appellee and its *amici* are inherently deficient[2] because they lack a proper, honestly articulated factual basis pertinent to *this* controversy as actually presented. Appellants respectfully ask the court to bear these considerations in mind in considering this case.

It should also be noted by way of introductory clarification that some of Appellee's *amici* seem to be confused as to California law of remedies. Appellants sued seeking two remedies: (a) just compensation by way of inverse condemnation, and (b) declaratory relief by way of determination of unconstitutionality of the ordinance. The California Supreme Court denied the latter form of relief because under California law declaratory relief may be used only to challenge the *facial* constitutionality of laws (see *State v. Superior Court* (*Veta*), 12 Cal.3d 237, 251, 115 Cal.Rptr. 497, 524 P.2d 1281 (1974)). The court below thereby did not determine that the ordinance worked no taking (as erroneously asserted by some of Appellee's *amici*), but only that such a taking did not appear *on the face of the ordinance*. That, of course, in no way deals with the question of whether (notwithstanding the language of the ordinance) any reasonable use can in fact be made of the subject property, *Nectow v. Cambridge*, 277 U.S. 183 (1928).

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[2]This is implicitly recognized in the voluminous brief of the Conservation Foundation, *et al.*, which unabashedly goes outside the record in an effort to conduct something in the nature of a trial in writing. Appellants reject the invitation to engage in such an endeavor;*this* is no place for it. They offer as a short reply the following query: if Appellants' cause is nearly as factually deficient as asserted by these *amici*, would it not follow that the *amici* should welcome a trial on on the merits, where—if their argument has any merit—Appellants would quickly suffer a defeat? Moreover—and far more importantly—this is the United States Supreme Court, not a trial court. This Court decides national constitutional law and policy; it does not sit as a trier of fact for Marin County. In short, if a determination of facts and factual inferences is what is wanted, the cause ought to be remanded for trial.

In other words, whether an effective taking of the subject property occurred in fact (*i.e.*, by the impact of the ordinances *and the other city acts alleged*, in their totality), could only be reached by the inverse condemnation action which—until the California Supreme Court spoke in the case at bench[3]—was the way in which to examine the impact of the specific facts on the aggrieved owner's property rights. Moreover, the issue is *not* what any state deems to be controlling; this is an avowedly *federal* constitutional issue, and it is for this Court to say what type of factual inquiry into the facts is required to establish a taking, and what remedy is appropriate. As Mr. Justice Holmes put it in *Davis v. Wechsler*, 263 U.S. 22, 24 (1923):

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

1.

PRELIMINARY OBSERVATIONS ON ARGUMENTS OF APPELLEE AND ITS AMICI.

The wide-ranging Appellee's Brief and the avalanche of *amici* briefs filed in its support make it appropriate to bring the arguments contained there within some manageable bounds, before addressing the specific legal arguments

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[3]It must be observed that (as noted by Clark, J., in his dissent below—J.S.A., pp. 20-21, fn. 3) California has for a long time adhered to the view that once a taking has occurred, public use was deemed to attach, and the owner's *sole* remedy was inverse condemnation; see *e.g.*, *Hillside Water Co. v. City of Los Angeles*, 10 Cal.2d 677, 688, 76 P.2d 681 (1938). All of this law and its rationale were simply ignored by the majority opinion below in a sudden change of state law. *Cf. Hughes v. Washington*, 389 U.S. 290 (1967).

sought to be made there. To that end some general preliminary observations seem in order:

A. Appellants Contend That It Was Error for the Court Below to Promulgate the Absolutist Dogma That Just Compensation Is Never Available for Regulatory Takings; the Converse Arguments Ascribed to Them Are Spurious.

Appellee and its *amici* distort Appellants' legal argument to a shocking extent. Appellants do *not* contend that just compensation is the *only* remedy in regulatory takings. *A fortiori*, they do not contend that just compensation is or ought to be payable in every case of regulation that results in *any* diminution of private property values; indeed, the imputation of the latter argument to Appellants is simply intellectually dishonest. Appellants' view is that the problem of takings is so heavily dependent on the specific facts of each individual case (as so often noted by this Court) that their exploration in terms of impact on the subject property and its aggrieved owner is indispensable in terms of fashioning a remedy. Thus, for example, to a landowner whose ownership or interest in land has been completely wiped out by regulatory maneuverings so that whatever he had is gone, it is grotesquerie, right out of Franz Kafka's writings, to be lectured about invalidation as a "remedy."[4]

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[4]California case law increasingly involves cases in which landowners lost their land by foreclosure while being compelled to joust with the ever-turning regulatory windmills erected in their path by local entities. See *e.g.*, *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1366-1367 (1978, 9th Cir.); *Orsetti v. Fremont*, 80 Cal.App.3d 961, 146 Cal.Rptr. 75 (1978), *Hollister Park Investment Co. v. Goleta County Water Dist.*, 82 Cal.App.3d 290, 147 Cal.Rptr. 91 (1978); *Frisco Land & Mining Co. v. State*, 74 Cal.App.2d 736, 141 Cal.Rptr. 820 (1977). Also see, *Klopping v. City of Whittier*, 8 Cal.3d 39, 58, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972), *County of Los Angeles v. Berk*, 26 Cal.3d 201, ... Cal.Rptr. ...., ... P.2d .... (1980).

The issue before the Court is not Appellants' supposedly rigid pro-compensation view, but the California Supreme Court's absolutist pronunciamento that just compensation is *never* available, *no matter how flagrant the non-physical taking* accomplished by land use regulation, and *no matter how severe its impact*. That court simply set itself at war with the principle of case-by-case adjudication that weighs the facts of each controversy, and by fiat did away with the monetary remedy, irrespective of the individual facts. It is the correctness of *that* dogmatic proposition that is before the Court for review, *not* its converse. Once that true issue is confronted, Appellee's assertion that the opinion below rests on sound law collapses; it does so even on the very authorities relied on by Appellee.[5]

Thus, in *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), the New York Court of Appeals was careful to delineate areas where just compensation *does* remain available as a remedy for a non-physical taking. (Even so, the New York position has been soundly criticized; see, Note, *De Facto Takings and the Pursuit of Just Compensation*, 48 Fordham L. Rev. 334 (1979)). So did the Supreme Court of North Dakota in *Eck v. City of Bismarck*, 283 N.W.2d 193, 201. So did the courts of Florida: *Moviematic Industries, Inc. v. Dade County*, 249 So.2d 667, 672 (1977, Fla.App.); *Estuary Properties, Inc. v. Askew*, ... So.2d .... (1979, Fla.App.); *Askew v. Gables-by-the-Sea*, 33 So.2d 56 (1976, Fla.App.).

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[5]Needless to say, even on Appellee's faulty premise, such state court decisions are of little precedential authority in light of *Lake County Estates v. Tahoe Regional Planning Agency*, ... U.S. .... 59 L. Ed.2d 401 (1979) The notion embedded in Appellee's arguments, of the tenor that such state court decisions are authoritative on the federal constitutional point in issue, has a quaint, positively *ante bellum* quality.

So did the courts of Colorado: *Hermanson v. Board of County Comm'rs., etc.*, 595 P.2d 694, 695 (1979, Colo.App.).

The point is that these are all states whose courts opt for the invalidation remedy as the *primary* remedy. Yet, they all recognize as a matter of logic and basic fairness that circumstances can and do arise where a non-physical taking has occurred but a declaration of invalidation is useless (such as where the injury has already occurred; see *Butz v. Economou*, 438 U.S. 478, 504-505 (1978)). It is only California whose courts have taken the dogmatic position that even where it can do no possible good, invalidation is the *only* remedy.[6]

Above all, this Court was careful to note the availability of the civil rights damage remedy in *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, ... U.S. .... 59 L.Ed.2d 401 (1979).[7]

Thus, any rigid, unyielding absolutism that may be present in this case lies on the Appellee's, not Appellants', side of the argument.

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[6]Please note that since the earlier briefing by Appellants yet another state court opted in favor of inverse condemnation rather than mandamus: *Clifton v. Berry*, 259 S.E.2d 35 (1979, Ga.). For a concise survey of the division of states on this issue see the Jurisdictional Statement (hereafter cited as J. S.) at pp. 19-22, and [Appellants'] Response to Motion to Dismiss or Affirm, at pp. 12-13.

[7]In connection with *Lake County Estates*, Appellants note with bemusement reliance by Appellee and some of its *amici* on *Jacobson v. Tahoe Regional Planning Agency*, 474 F.Supp. 901 (1979, D. Nev.), in which a trial judge apparently defied this Court, and on remand purported to rule that in spite of the plain language of 42 U.S.C. §1983 creating liability ". . . in an action at law . . .", and in spite of *Lake County Estates*, he would afford no such remedy, and then presumably for good measure refused to entertain a plea for a non-monetary remedy as well, and dismissed the action. While no doubt unintended by Appellee, that decision provides a penetrating commentary on the state of pertinent law, and the attitude of some toward property rights—an additude that could stand some corrective action by this Court.

B. Large Judgments Can Threaten Only if the Constitution Is Being Violated on a Large Scale; if so, All the More Reason for This Court's Corrective Intervention.

Appellee (and particularly its *amici*) can scarcely be serious when they intone their doomsday cry of impending fiscal catastrophe. If ever there was an argument that proves too much, this is it.

If a dramatic "financial disaster"[8] threatens, that can only mean one thing (assuming the argument to be anything but frivolous): private property is being confiscated on a large scale. As this Court noted in *Davis v. Passman*, ... U.S. ...., 99 S.Ct. 2264, 2217 (1979), damages can only accrue when the Constitution has been violated. Surely, the parties making such assertions are not seriously contending that the American judiciary is endemically unable to distinguish between meritorious and frivolous claims.[9] Such implicit argument is itself frivolous; as every lawyer with pertinent experience knows, an inverse condemnation suit undertaken on behalf of an owner is a formidable task with victory

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[8]Brief of the Conservation Foundation, *et al.*, at p. 45

[9]But then again, see *amicus* brief of State of California, p. 51, fn. 21, which unblushingly deplores the very essence of the flexible case-by-case approach to taking problems, that this Court has repeatedly endorsed in recent cases. Given the State's professed horror at the prospect that trial judges tend to resolve issues before them on the basis of their ". . . individualized analysis of the conflicting evidence" (*Id.*), one is left to wonder as to how the State proposes to resolve individual disputes in the courts. This bizarre argument seems to be premised on the avowed notion that courts ought to stultify their most basic function of adjudication for the sake of administrative convenience (*i.e.*, to allow a regulatory agency "to draw a hard and well-defined line as to the permissible extent of its powers" as opposed to "that variable reality" of case-by-case adjudication—*Id.*). This is nothing short of saying that the courts should not be permitted to consider the constitutionality of administrative acts *as applied*, lest it interfere with regulatory agencies' "line drawing". That does not leave much of judicial pre-eminence in constitutional matters.

elusive and just compensation long delayed. It is a drastic measure of last resort. (See Huxtable, *Inverse Condemnation—Its Structures, Advantages and Pitfalls*, 1977 Institute on Planning, Zoning and Eminent Domain, Southwestern Legal Foundation, 219, 247-250).

Such arguments were probably best dealt with by the great past Chief Justice of California, Roger Traynor, who said of such doomsday cries:

> "The tenet of lag, strengthening the already great restraints on the judge, is deservedly respected. It bears noting, however, that it is recurringly invoked by astute litigants who receive aid and comfort from law that is safely behind the times with the peccadillos of yesteryear and has not caught up with their own. At the slightest sign that judge-made law may move forward these bogus defenders of stare decisis conjure up mythical dangers to alarm the citizenry. They do sly injury to the law when the public takes them seriously and timid judges retreat from painstaking analysis within their already great constraints to safe and unsound repetitions of magic words from the legal lore of the year before much too long ago." Traynor, *No Magic Words Could Do It Justice*, 49 Cal.L.Rev. 615, 620 (1961).

And so it is here; logic tells us that if large judgments threaten, that can only mean that egregious and widespread takings have occurred. *Davis v. Passman, supra*, 99 S.Ct. at 2278. That, in turn, can only mean that the Constitution is being violated on a massive scale by local regulatory entities. That, with all due respect, is hardly a condition that commends itself to protective judicial solicitude. Appellee and its *amici* seem to have forgotten that the polestar of American constitutional jurisprudence is the judicial adherence to the oath of office which commands each judge

to respect the Constitution above all. That is the foutainhead of American judicial supremacy in constitutional interpretation: *Marbury v. Madison*, 1 Cr. (5U.S.) 137, 180 (1803). Making the lot of the Constitution's effectively self-confessed large-scale violators easy, cheap and convenient would not appear to fit that jurisprudential and ethical principle.

Moreover, such arguments collapse even on their own unsound premise; even if just compensation is not an appropriate *remedy*, that still leads one ineluctably to the concession that widespread takings are occurring (how else could there be a threat of massive judgments?). What these parties are thus *really logically* saying is that even if they are right, the courts have been remiss in failing to invalidate large numbers of regulations. Again, the argument is tantamount to concession of massive constitutional violations.

And so, even accepting *arguendo* the extravagant assertion that a "financial disaster" threatens, the perpetrators of such massive constitutional disregard had best mend their ways rather than ask for a license to continue. These are matters that, in Professor Michelman's apt words, call

> ". . . for resolute sophistication in the face of occasional insistence that compensation payments must be limited lest society find itself unable to afford beneficial plans and improvements. What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose cost, including costs which remain 'unsocialized' exceed their benefits. Thus, it would appear that any measure which society cannot afford or, putting it in another way, is unwilling to finance under conditions of full compensation, society cannot afford at all." Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1181 (1967).[10]

Appellee and its *amici* are shrilly demanding nothing less than a rule that would favor the constitutional violator and disfavor the individual citizen seeking *effective* (not theoretical) vindication of his rights protected by the Bill of Rights. They are demanding nothing less than a rule that would make concededly flagrant constitutional violation cheap, convenient, and in the long run virtually risk-free. They ought to be informed that here as elsewhere there is no such thing as a free lunch.

> ". . . [V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. Memphis*, 373 U.S. 526, 537 (1963).[11]

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[10]This astute observation spotlights the inherent immorality underlying the Appellee's arguments, whereby in an inversion of the Robin Hood principle, a conspicuously wealthy community would enhance its enviable condition at the expense of one of its inhabitants, without paying for what it gets. Such concerns reach some sort of nadir in the *amicus* brief of the Federation of Hillside and Canyon Associations. These denizens of legendary pinnacles of exclusivity, displaying the most spectacular accumulation of wealth in the West, comprised in disproportionate measure of business tycoons, show business personalities, successful professionals, and all sorts of entrepreneurs, come before this Court and fervently denounce, of all things, profits (see *Id.* at p. 29), thereby displaying not only awe-inspiring chutzpa but also a lamentable lack of understanding of the present record (*i.e.*, since the courts below denied liability, the issue of measure of damages was never reached; moreover, such measure does not include profits in any event—see Appellants' Brief, at pp. 33-34, fn. 14).

[11]For a detailed exploration of the principle that an asserted shortage of funds is no justification for violation of constitutional rights, see *Gates v. Collier*, 501 F. 2d 1291, 1319-1320 (1974, 5th Cir.). That principle is *a fortiori* applicable here, considering the economic make-up of Tiburon. In other words, what we have here is an unwillingness, not inability, to pay for the acquisition.

C. The Invalidation "Remedy" Is de Facto Not Available in California.

Appellee espouses a far more favorable view of the invalidation remedy in California than reality justifies. Appellants stand by their contention that there has been no reported case of invalidation *on grounds of taking* in California since *Hamer v. Town of Ross*, 59 Cal.2d 776, 31 Cal.Rptr. 335, 283 P.2d 376 (1963). Appellants further suggest that—with all due respect—Appellee has misinterpreted the case on which it principally relies (*Furey v. City of Sacramento*, 24 Cal.3d 862, 157 Cal.Rptr. 684, 598 P.2d 844 (1979)), and has failed to note its literal and legal bottom line. *Furey* did not invalidate anything; it merely remanded the cause to the trial court with directions that at first absolutely nothing be done (See 24 Cal.3d at 878), in deference to a foreshadowed special reassessment proceeding (See 24 Cal.3d at 873), without a hint as to how or *when* this would occur, or with what results. Moreover, *Furey* gives no indication as to the nature of the reassessment: Is it to be prospective only (*i.e.*, involving reduction or cancellation of future payments)?, or, is it retroactive?; and if the latter, is the entire assessment to be voided, or is there to be a new reassessment in some lesser amount, and if so, how determined?

In short, *Furey* invalidated absolutely nothing; it only gave a vague promise of delay and more litigation virtually certain to consume years,[12] during which the owner continues to be denied the right of rational use.[13]

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[12]Since interest in such proceedings accrues at 7% (See Cal. Streets & Highways Code §5503), and the current rate of inflation hovers around 18%, little imagination is needed to envision the diligence with which such reassessment is likely to be pursued.

[13]A most penetrating insight into the efficacy of this supposed "invalidation" is provided by the fact that the ostensible winner (*i.e.*, the landowner) went to the trouble and expense of seeking review by this

As for the many cases collected at Appellee's Brief, p. 28, fn. 24, not one of them struck down a regulation as working a taking. What purpose their citation serves is thus obscure.[14]

And so it is with the other California post-1963 cases cited by the parties; they speak for themselves, and need not be further discussed.[15] In *none of them* did a landowner receive any relief for confiscatory regulations; not even in cases of bankruptcy and foreclosure caused by inability to use one's land (See *supra*, fn. 4). What happens all too often is that landowners seeking to use their land are confronted with unceasing change in the regulations, until their economically viable stake is effectively destroyed. *That* is how it is done in California; no regulation is stable; nothing is reliable; indeed, Appellee expressly concedes this.[16] No

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Court, while the ostensible loser stoutly resisted such review, proclaiming itself delighted with the decision of the California Supreme Court, in which it supposedly lost. A most curious epilogue to this "invalidation."

[14]On the other hand, this may be a somewhat Freudian insight into prevailing California governmental mentality, suggesting the presence of a view that whenever a landowner wins in California (on *any* grounds), these days that is somehow remarkable.

[15]Except for one. In the *amicus* brief of the State of California (p. 50, fn. 20) one is startled to come across an assertion impugning the integrity of Appellants' counsel in discussing the *Briggs* case. Since the State is correct in foreshadowing an imminent review of *Briggs* by this Court, the Court will have an early opportunity to assess for itself the accuracy of the State's assertion that in *Briggs* the trial court awarded damages ". . . based *solely* on the permit denial" (*Id.*, emphasis in the original). For now, a pointed reference to A.B.A. Code of Professional Responsibility, Canon 7, Ethical Consideration 7-14 (on the obligation of government counsel to present the courts with "a full and fair record") should suffice.

[16]At Appellee's Brief, p. 25, fn. 21, Appellee takes pride in the fact that "[z]oning, by its nature is not permanent", and then leaps to the *non sequitur* that zoning, therefore, can never work a taking because supposedly a "taking" must be permanent (this, of course, is simply wrong; takings can and often are temporary, as more fully discussed, *infra*). This further instance of an argument that proves too much, bears an alarming kinship to the sad (if familiar) notion that a successful shell game requires its operator to keep the shells in motion. Hardly an endorsement of zoning.

rights are said to be "vested" until construction is underway. This point is probably best made by an extended quotation[17] from a California appellate court which felt bound by precedent to deny relief, even though its conscience was obviously shocked. *This* is California reality of today:

> ". . . the denouement of this lawsuit leaves the members of this court, as appellate chancellors in equity, with a dissatisfied sense of justice. In hard fact, Raley spent $150,000 in reliance upon a land-use permit lawfully granted by a state instrumentality which was then repudiated by a related state instrumentality. The two agencies had overlapping membership and occupied a relationship of mutual awareness and privity. (See *Lerner v. Los Angeles City Board of Education*, 59 Cal.2d 382, 398-399 [29 Cal.Rptr. 657, 380 P.2d 97].)
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> "Several factors combined to cause the developer's loss and prevent its redress. Raley is the victim of maladroitly engineered environmental controls. California's current need for 200,000 new jobs each year can be met only by a flow of venture capital. The protection of the state's remaining environmental amenities unavoidably constricts this flow. The competing needs of economic development and environmental protection can be brought into balance only through competent, speedy and authoritative decision-making. "California is faced with a bewildering number of conflicting planning jurisdictions, none of which have the responsibility or the capability to adequately carry out comprehensive regional planning. . . . Most state-mandated planning is done by numerous overlap-

[17]Appellants beg the Court's indulgence for the length of this quotation; it needs, however, to be given full expression, coming as it does, not from an interested party, but from the pen of one of the most respected and articulate members of California's appellate judiciary.

> ping single-purpose agencies (there are over 100 in the state), each with a varying degree of authority to enforce its plan." (Marks & Taber, *Prospects for Regional Planning in California*, 4 Pacific L.J. 117, 118, 124; see also, Comment, 25 Hastings L.J. 1165.)
>
> "The mechanism at work here combined to 'protect' the environment by protracted and undependable administrative procedures followed by years of litigation. Only the most hardy and well-heeled can run so harsh a gauntlet.[18] Burdened by land costs, loan interest, architectural, engineering and attorney fees, many entrepreneurs run out of money or heart or both long before the finish line.
>
> "Handmaiden of prevailing administrative anarchy is the vested rights rule, as voiced by the authoritative decisions cited earlier. The vested rights rule gives a green light to administrative vacillation virtually up to the moment the builder starts pouring concrete. The rule has been described as a 'common law' rule and as a 'constitutional common law principle.' It is neither. The rule, as we have observed it, is a manifestation of equitable estoppel.

[18]"In a recent description of America's most acute needs for speed and economy in dispute resolution, Chief Justice Warren Burger declared: 'Ways must be found to give appropriate weight to ecological and environmental factors without foreclosing development of needed public works and industrial expansion by inordinate delays in litigation. The accommodation of the conflicting values demands that there be a swift resolution of those cases, so as to avoid the waste involved in suspending execution of large projects to which vast public or private resources are committed. This country has appropriately committed itself to protecting our environment, but we must also build needed schools, homes and roads, and in the process provide jobs.' Address given at National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in April 1976, reprinted under the title, *The Direction of the Administration of Justice* (1976) 62 A.B.A.J. 727"

"Historically, estoppel was administered by the equity chancellor; its function was justice and good conscience; it was evoked by motives of equity and fair dealing in order to prevent the inequitable enforcement of *other* rules of law. (3 Pomeroy's Equity Jurisprudence (5th ed.) § 802, pp. 180-181.) Equitable estoppel bespeaks a thirst for individualized justice, obedient to general doctrine but relatively free of servitude to fixed verbalisms. In the evolutionary dynamics of California environmental law, the plasticity of equitable estoppel has been replaced by the rigidity of the vested rights rule. Doctrinal evolution has come full circle — from the formal, unmoral rigidities of medieval common law to the individualized humanity of equity and back again to the fixed demands of the vested rights rule.

Raley v. Calif. Tahoe Regional Planning Agency, 68 Cal.App.3d 965, 984-985, 137 Cal.Rptr. 699 (1977) footnote 15 omitted.

That is today's California reality—not the fanciful sugar-coated platitudes of Appellee and its *amici*. It is that grim reality that underscores the appropriateness of availability of just compensation as a remedy for egregious abuses, so that any citizen—not merely ". . . the most hardy and well heeled . . ."—can avail himself of effective constitutional protection.

D. The Professed Nobility of Appellee's Asserted Goals Does Not Justify the Use of Unconstitutional Means.

The presentation of Appellee and its *amici* makes a classic example of confusion between ends and means. The pursuit of noble environmental goals no more entitles one to disregard the language and policy of the Constitution than does the pursuit of any other desirable societal goal; see *United States Trust Co. v. New Jersey*, 431 U.S. 1, 29-30 (1977).

For example, all right-thinking people abhor violent criminal acts (which in today's world are a most serious and pervasive problem), but that hardly justifies exhortations to freely swung police truncheons or warrantless midnight raids,[19] even if such were to reduce criminal activity significantly. There are simply some values which *this* society deems so vital as to make them *supreme* law which is not to be subordinated to arguments of efficiency or desirability.[20] Or, as the Massachusetts Supreme Court so aptly put it:

> "In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the department of conservation to look after the interest of the former, and it is the duty of the courts to stand guard over constitutional rights." *Commissioner of Natural Resources v. S. Volpe & Co.*, 206 N.E.2d 666, 671 (1965, Mass.)

This Court has likewise expressed itself on this point in *United States Trust Co. v. New Jersey, supra*, 431 U.S. 1, 28-29:

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[19]As Mr. Justice Jackson put it: "If officers search my house and seize my papers, with no threat to my person, only property may be directly touched; but I can think of no greater affront to my person." Jackson, *The Task Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A. Jour. 961, 963 (1953).

[20]Indeed, the *amicus* brief of the City of San Jose (at p. 34), after much eloquent circumlocution, eventually gets around to making the vital concessions on which this controversy ultimately centers: what needs to be done to achieve what Appellee and its *amici* really desire is to nationalize privately owned land and to amend the Fifth Amendment so as to spare the takers the inconvenience of having to pay just compensation. Just so! That is exactly what Appellee contends, except that it has not had the temerity to come out and say so as did its *amicus*. But the Constitution still stands *un*amended to such specifications, and so long as it so stands it guards against indirect, as well as direct, attacks on the values it protects. *Macallen v. Massachusetts*, 279 U.S. 620, 629 (1929).

"Mass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern. Appellees contend that these goals are so important that any harm to bondholders from repeal of the 1962 covenant is greatly outweighed by the public benefit. We do not accept this invitation to engage in a utilitarian comparison of public benefit and private loss. . . . Thus a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors."

The same is true here.

E. By Claiming That it Cannot Tell When it Violates the Constitution Appelleee Contradicts the Basis of its Central Argument.

The arguments of the Appellee and its *amici* add up to a massive self-contradiction. When it comes to pursuit of regulatory ends, the city is depicted as clear-thinking, conscientious, courageous, respectful of societal values, willing to face hard realities, and dedicated to the public good.[21] Yet, when it comes to implementation of those ends and to the choice of means, the regulators are depicted as inept, confused, and (in spite of lavish assistance by counsel and expert consultants), unable to tell constitutional right from wrong, so that they blunder over the constitutional boundary with such ingenuousness as to lay a claim to a judicial rescue

[21]Although, curiously enough, to the extent local California municipalities have shown an inclination to regulate themselves so as to provide ample room for growth, they are criticized for so doing in the *amicus* brief of the American Planning Association (at pp. 63-64). One begins to wonder to what extent the asserted deference to local regulatory wisdom is being colored by unspoken commitments to idiosyncratic ideologies.

operation that would keep them from having to face the constitutional consequences of their own acts. This, with all due respect, is an image that simply won't wash; if the regulators are astute enough to select and pursue their chosen governmental ends, they should also be responsible enough to select appropriate means. As this Court pointedly noted in *International Paper Co. v. United States*, 282 U.S. 399, 406 (1930):

"The government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late."

F. Appellee's Notion of "Chilling" Stands American Constitutional Jurisprudence on its Head, By Demanding That Constitutional Violators Be Favored.

Much is said in support of Appellee's position about a supposed "chilling" of governmental regualtory activities, that is foreshadowed if access to the constitutional remedy of just compensation is reaffirmed by this Court. Appellants suggest in response that the various parties making such arguments have their societal and constitutional values backwards. The concept of "chilling" rests on the idea that the rights incorporated and protected by the Constitution are so precious that the courts stand guard over them, and protect them not only from outright invasions, but also from threatening governmental activities that, though not crudely violative of the constitutional letter, would in reality tend to discourage individuals from availing themselves of those cherished rights. *That* is what "chilling" is all about.

For Appellee and its *amici* to come out boldly in favor of standing this concept of "chilling" on its head, and to demand that the constitutional values be narrowly circum-

scribed, lest those who would violate them be "chilled",[22] is simply an Orwellian inversion of the English language. The ethical and logical basis on which the concept of "chilling" rests means to protect the individual citizen from constitutional overreaching by the powerful government, not the other way around (history teaches that governments tend to take care of themselves). It is indeed supposed to provide disincentives *to the government* when it sets out on a constitutionally suspect path. It would be an anomalous twist, contrary to two centuries of American constitutional jurisprudence, to say that constitutional violations should be encouraged, lest their discouragement work a "chilling" of those who would set out on a path of collision with the nation's organic law and the precious values it enshrines.[23]

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[22]It must be emphatically noted that no one on Appellee's side worries about any supposed "chilling" in the context of invalidation; it is only when it comes to having to pay just compensation that the bogus tocsin of "chilling" rings out. That—Appellants suggest—tells volumes; the commitment of the parties making that argument is thus *not* to the Constitution, but only to their self-interest (i.e., to a remedial legal structure that would make constitutional violations convenient, and above all cheap).

Appellants suggest in reply that confronting a would-be constitutional violator with the prospect of unpleasant consequences is not "chilling"—it is deterrence from wrongdoing.

[23]In that connection, one notes the Appellee's bald assertion (Appellee's Brief. 16) suggesting that no "fundamental rights" are involved here. Significantly, that naked assertion appears as *ipse dixit* in a heading which is not supported by any reason or authority. Suffice it to say in reply that this Court definitively rejected this unsound notion in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972), where it made explicitly clear that the right to ". . . enjoy property without unlawful deprivation . . ." enjoys the same degree of protection as ". . . the right to speak or the right to travel." This principle, in turn, rests on the eminently sensible notion that the most precious "personal" rights cannot be enjoyed by persons whose property rights are not similarly protected. "Neither could have meaning without the other" (*Id.*).

G. Appellee's Arguments Ignore the Concept of Fairness That Is the Cornerstone of the Constitution.

Finally, an observation must be made on one aspect of the arguments of Appellee and its *amici* that is conspicuous by its absence. fairness.

Appellee and friends devote all their policy arguments to the support of governmental convenience, studiously ignoring in the process the idea that the persons who own land in *this* country are not some sort of enemy to be fought, but living, breathing individuals whose lives and lifetimes of work are at stake, and who both deserve and are entitled to the protection promised them by their Constitutions.[24] In the words of a recent commentary:

> "Fairness requires that individuals be treated not merely as means to social ends but rather as persons who deserve respect as ends in themselves. Although fairness standards are necessarily indeterminate, courts faced with particular challenges to zoning measures must nonetheless ask whether those measures exact such a disproportionate sacrifice from individual property holders relative to their peers and to their expectations that the affected individuals may be seen as having been treated solely as a means in a process of social engineering." Comment, *Developments in The Law: Zoning*, 91 Harv. L. Rev. 1429, 1492 (footnote omitted).

Those ethical principles have been wholly ignored by Appellee's arguments.

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[24]The California Constitution (Art. I, §1) symbolically places at its beginning the ". . . acquiring, possessing, and protecting property . . ." as one of the secured ". . . inalienable rights. . . ."

2.

THE OPINION BELOW SQUARELY DEALS WITH THE CONSTITUTIONAL ISSUES OF TAKINGS AND REMEDIES, AND EXPRESSLY BELIES APPELLEE'S "ADMINISTRATIVE REMEDIES" ARGUMENTS.

The matters suggested by the above heading were discussed in Appellants Response to Motion to Dismiss or Affirm at pp. 7-10 (to which the Court's attention is respectfully invited), and need not be repeated at length here. The court below could not have been clearer in rejecting the notion that any "administrative remedies" threshold problem was involved.[25] So did this Court, as discussed presently.

By way of brief summary, the "administrative remedies" argument is without merit because:

(a) What is involved here is a major zoning ordinance which is a legislative, not administrative, governmental act (*City of East Lake v. Forest City Enterprises,* 426 U.S. 668 (1976); *San Diego Bldg. Contractors Assn. v. City Council,* 13 Cal.3d 205, 118 Cal.Rptr. 146, 529 P.2d 570 (1974)). There are no "administrative" remedies

[25]See particularly Appendix A to Appellants' Response to Motion to Dismiss or Affirm, in which the California Supreme Court carefully deleted all references to "administrative mandamus" (the California judicial remedy that serves to review administrative acts), and amended its opinion to make clear that ordinary mandamus (a remedy used to review legislative acts) was its chosen remedy. "Administrative mandamus" is the statutory review procedure of *administrative* acts (Cal. Code Civ. Procedure §1094.5). By long standing and well settled California law, this is a remedy limited to judicial review of administrative matters and is not available to review legislative acts. See *Wulzen v. Board of Supervisors* (1894) 101 Cal.15, 35 P.353, *Strumsky v. San Diego County etc.* (1974) 11 Cal.3d 28, 35, fn. 2, 112 Cal.Rptr. 805, 809, 520 P.2d 29. For an explication of the California legislative intent in adopting Cal. Code Civ. Proc. §1094.5, see *Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 598-601, 241 P.2d 283.

to be pursued here,[26] and, moreover, it is axiomatic that one need not supplicate the legislative to change the law before challenging its constitutionality.

(b) Since, under the facts alleged, a claim of deprivation of constitutional rights is invoked, for which a judicial remedy at law or in equity lies under 42 U.S.C. §1983 (*Lake County Estates v. Tahoe Regional Planning Agency,* .... U.S. ...., 59 L. Ed.2d 401 (1979)), no pursuit of administrative remedies is required in any event (*Damico v. California,* 389 U.S. 416 (1967)). Also, in light of Appellee's consistent and avowed commitment to keeping the subject property as an indispensable part of the City's open space resources, any such pursuit of these non-existent "remedies" would have been futile in any event. (See *Dahl v. City of Palo Alto,* 372 F.Supp. 647, 649, fn. 2, (1974, N.D. Cal.)).

(c) The court below did not base its decision on any such threshold matters but went to the substantive and remedial merits of the federal constitutional issues presented.

(d) The court below decided the very issue tendered by Appellee (See Appellants' Response to Motion to Dismiss or Affirm, at pp. 9-10) and thus Appellee is hardly in a position to argue that the issue was not properly before that court.

(e) Whatever comforting language Appellee may find in the California intermediate appellate court cases it cites, the blunt fact is that in its most recent decision on point, the California Supreme

[26]See *Moore v. East Cleveland,'* 431 U.S. 494, 511-512 (Brennan, J., concurring.)

Court definitively rejected the argument that administrative remedies need to be exhausted before mounting a judicial *constitutional* challenge. *State v. Superior Court* (*Veta*), 12 Cal.3d 237, 250-251, 115 Cal.Rptr. 497, 524 P.2d 1281 (1974).

Aside from these matters, Appellee overlooks that this Court expressly considered *and rejected* that very argument in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926). There, the city argued that the landowner was required to seek permission to use his land contrary to the zoning ordinance before suing. This Court disagreed.

Finally, the California Supreme Court chose to decide a prime constitutional issue that created a harsh precedent going directly to *federal* constitutional rights of Californians. If the court below had intended to base its decision on any threshold procedural matters by state law, it would have said so;[27] instead, it expressly chose to address remedies under the Fifth Amendment. *That* is what is before this Court for review. The issue now ingeniously asserted by Appellee and its *amici* formed no part of the decision below and is thus not properly raised now.

3.

THE PRESENT RECORD MAKES IT CLEAR THAT THE SUBJECT PROPERTY HAS BEEN RENDERED USELESS AND WORTHLESS; ANY FACTUAL CONTROVERSY ON THAT POINT THAT APPELLEE WISHES TO PURSUE SHOULD BE RAISED IN A TRIAL ON THE MERITS.

Much is said by Appellee and its *amici* about Appellants' supposed ''right'' to build at least one house. Putting aside

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[27]When the California Supreme Court wants to deal with the state law of remedies, it knows how to make its purpose clear; see *State v. Superior Court* (*Veta*), 12 Cal.3d 237, 115 Cal.Rptr. 497, 524 P.2d 1281 (1974).

the fact that the allegations (which on this record are the only facts before the Court) are to the contrary, and putting aside the fact that such an argument simply contradicts Nectow v. Cambridge, 277 U.S. 183 (1928).[28] the ordinance before the Court itself belies the supposed ''right''.

While Appellee and friends exhort the ''Uses Allowed By Right'' part of the ordinance as well as its density provisions (see J.S.A. at pp. 31-32), they stop their reading too soon. Immediately following these provisons there come ''Standards'' (J.S.A. at pp. 32-33), which make it crystal clear that nothing can be built on the subject property except by the City's whim, *and* that the owner would literally have to deed the ''open space'' land to the City (J.S.A. at p.32). What these draconian measures leave of utility and value is at best illusory. Surely, Appellants are entitled to show on the merits that the market's reaction is to shun land which (putting all else aside for the moment) would have to be purchased by its users in large lots which then would have to be largely dedicated ''in fee title or of scenic easements'' etc. to the City. Suffice it to say that when given the opportunity an owner may be able to prove that such severe restrictions (that first create large lots and then stultify their use and enjoyment as such), do constitute a taking. That is quite similar to what happened in *Arastra Limited Partnership v. City of Palo Alto*, 401 F.Supp. 962 (1975, N.D.Cal.), where the aggrieved landowner proved just that.

And, of course, there is also the impact on value, utility and marketability of Appellee's avowed and widely publi-

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[28]*Nectow*—relied on by Appellants but completely ignored by Appellee—held that notwithstanding a zoning ordinance's ostensible permission to put the land to some uses, it was proper for a trier of fact to consider the economics of such uses and to conclude that actually such ostensibly permitted uses denied the owner any economically rational use of his land or any return on his investment.

cized intention to make the subject property an "indispensable" part of its "open space", and the on-again, off-again condemnation, all of which Appellee and friends have simply ignored.

In sum, this record makes it clear that Appellants may well be able to prove a taking, given a fair chance and their day in court. That would seem to be their constitutional right, as this Court explained in *Portsmouth Harbor L. & H. Co. v. United States*, 260 U.S. 327, 330 (1922).

4.

THE NATURE OF PROPERTY AND THE EFFECT OF REGULATIONS ON IT LEAD TO THE CONCLUSION THAT A "TAKING" NEED NOT ENCOMPASS THE ENTIRE FEE SIMPLE ABSOLUTE TITLE, BUT MAY INVOLVE ONLY THE TAKING OF A PARTICULAR PROPERTY RIGHT, WITH JUST COMPENSATION AWARDED ACCORDINGLY.

One of the myths extant in the field of inverse condemnation (that is displayed in the "parade of horribles" arguments of Appellee and its *amici*[29] is the legally and logically unjustified notion that if a "taking" is found and payment of just compensation is ordered, that somehow requires the taking entity to acquire involuntarily the entire fee simple absolute title and pay full fair market value of the entire "bundle of sticks" comprising the regulated property. This, in turn, is said to expose regulating entities to ruinous damages for what is but a misstep that goes only

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[29]See, *e.g.*, the *amicus* brief of the State of California, at p. 45, where a crude attempt is made to impute to Appellants an argument that "[s]lightly cross the line . . . and the hammer falls." In fact, as shown presently, that is the myth. The law requires examination of the facts of each case, and a determination of what, if anything, has been taken. Again, any supposed dogmatic approach to this problem lies on Appellee's—not Appellants'—side of the argument.

a bit too far—so goes the argument. (See, *e.g.*, the *amicus* brief of the State of California, at p. 43, where the State agonizes over whether the United States involuntarily bought "an enormous portion" of Virginia). In reality, neither such simplistic all-or-nothing "taking" theory, nor its supposed economically catastrophic sequelae have any substance.[30] Nonetheless, this spurious theory is regularly hauled out of mothballs, and is used to frighten unsophisticated local judges into refusing to grant *any* relief to grievously damaged property owners.[31]

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[30]And neither does the fallacious premise that would depict "regulation" so severe as to work a taking, as a careless misstep by a well-meaning regulatory agency. Not only do such meritless importunings propose that the judiciary ride to the rescue of irresponsible governmental agencies shrinking from facting the consequences of their disregard of the Constitution, but on the facts at bench they lack factual validity as well. What is involved here is a solemnly undertaken act of governance, arrived at only after careful study by leading expert consultants and with assistance of counsel. It was a deliberate process that invoked the full panoply of governmental powers, and took years to accomplish. In short, such arguments do not properly tug at judicial feelings of compassion; rather they are more in the nature of an irresponsible litigant seeking to evade accountability to the Constitution which it is bound to uphold rather than circumvent. The *amicus* brief of the City of San Jose, et al, provides the proverbial "Exhibit A." There (at pp. 5-6) it is argued with a straight face (albeit in flowing prose) that a *confessed* municipal blunder in racing against other cities to incorporate as much territory as possible, and then caving in to political pressure to deny reasonable land uses on the annexed land, is somehow an act of virtue to be rewarded. When viewed with some detachment, this argument is something less than overwhelming in its moral sweep. It does, however, provide a good illustration of what the court in *Raley* (quoted *supra*, at pp. 14-16) aptly called "administrative anarchy."

[31]This observation implies no disrespect to the judiciary at any level. On the contrary, it merely serves to acknowledge the fact of life known well to practicing lawyers, that judges are overwhelmingly generalists and their usual heavy workload is typically composed of criminal prosecutions, tort litigation, divorces, a sprinkling of commercial disputes, and occasional litigation of governmental regulations of businesses. Inverse condemnation cases are quite rare, and therefore it is hardly surprising that a typical state trial judge, bereft of research assistance, and unfamiliar with this arcane field (which has proven troublesome to leading scholars, and indeed, even to this Court with all its enviable resources), may well find himself intellectually intimidated by experienced attorneys' doomsday cries of imminent municipal ruin.

In fact, an analysis of the decisional law shows the myth to be just that. While in *some* cases in which the regulation's impact on the landowner[32] was wholly confiscatory, or where the non-physical taking was brought about by the governmental activities collateral to an overtly acquisitory intent (*as at bench*), courts have occasionally held that a complete taking had occurred. See *Benenson v. U.S.*, 548 F.2d 939 (1977, Ct. Cl.) (severe regulations prevented owner from using the Willard Hotel in Washington while the Government moved to acquire it); *Peacock v. County of Sacramento*, 271 Cal.App.2d 848, 77 Cal.Rptr. 391 (1969) (for several years all uses of subject property—save growing of grass—prohibited while the county tried to decide whether to acquire it for an airport; in the meantime, taxes on that property were raised annually); *Drakes Bay Land Co. v. U.S.*, 424 F.2d 574 (1970, Ct.Cl.), and 459 F.2d 504, 505 (1972 Ct. Cl.) (government successfully interfered with owner's plans for use of its land while awaiting Congressional appropriation to condemn it);[33] *Arastra Limited Partnership v. City of Palo Alto*, 401 F.Supp. 962 (1975, N.D.Cal.), opinion vacated by stipulation following sub-

[32]Please recall that the central criterion of a taking is the owner's loss, not the taker's gain: ". . . The question is, What has the owner lost? not What has the taker gained?": (*Boston Chamber of Commerce v. Boston,*) 217 U.S. 189, 194 (1910). This principle, although first articulated as a rule of valuation, was adopted by the Court as a criterion of taking: "The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." United States v. General Motors Corp., 323 U.S. 373, 378 (1943). Also see *Kimball Laundry Co. v. United States*, (338 U.S. 1, 13 (1948). Thus, where the governmental conduct has stripped the owner of *all* rights of ownership, a full taking *may* be the result.

[33]A similar case is *Bydlon v. U.S.*, 175 F.Supp. 891 (1959, Ct.Cl.), except that the taking technique there consisted of forbidding access to the subject property. Also see *Pete v. U.S.*, 531 F.2d 1018 (1976, Ct.Cl.), and 569 F.2d 565 (1978, Ct.Cl.) (a long-delayed denouement of the original *Bydlon* controversy).

stantial settlement, 417 F.Supp. 1125 (extensive scheme of ostensible regulations imposed in lieu of acquisition that so burdened the regulated land as to make it unusable); *Richmond Elks Hall Assn. v. Richmond Redevelopment Agency*, 561 F.2d 1327 (1977, 9th Cir.) (impact of announced, then delayed, then abandoned plans to condemn the subject property destroyed its utility and saleability; held: these events amounted to taking of such title as aggrieved owner had, 561 F.2d at 1332).

On the other hand, where the impact of governmental regulatory conduct on the affected land was less severe, courts have held that the "taking" was either temporary, or partial, or both. Thus, in *Sneed v. County of Riverside*, 218 Cal.App.2d 205, 32 Cal.Rptr. 318 (1963), the court held that an ostensible height regulation was in reality a taking of an avigation easement.[34] In *Lomarch Corp. v. City of Englewood*, 237 A.2d 81 (1968, N. J.), a regulation "freezing" land for a limited period of time in contemplation of possible public park uses was held to be a compensable taking of an option to purchase. In *Keystone Associates v. State*, 371 N.Y.S.2d 814 (1975, Ct. Cl.) rev'd. 389 N.Y.S.2d 895, (1976. App. Div.) rev'd. and remanded 45 N.Y.2d 894, 383 N.E.2d 560 (1978, N. Y.), a regulation improperly delaying demolition of the Old Metropolitan Opera House was held to be a temporary *de facto* taking and compensation was awarded on a temporary rental basis. Similarly, in *City of Austin v. Teague*, 570 S.W.2d 389 (1978, Tex.), the offending confiscatory governmental conduct (there, an unjustified permit denial) was interdicted by non-monetary judicial declaration while in the same pro-

[34]Similarly, in *United States v. Causby*, 328 U.S. 256 (1946), this Court did *not* require that Causby's land be acquired *in toto;* on the contrary, the matter was remanded to the Court of Claims to define with particularity the nature and extent of the *easement* found to have been taken there. See U.S. at 267-268.

ceeding the owner was awarded compensation for out-of-pocket losses incurred by reason of the improper governmental regulatory intervention. Accord, *San Antonio River Authority v. Garrett Bros.*, 528 S.W.2d 266 (1975, Tex. Civ. App.). And in *Gordon v. City of Warren*, 579 F.2d 386, 387 (1978, 6th Cir.), it was alleged that the wrongful municipal regulatory activities effected a *temporary* taking, and this was held to state a proper cause for relief under the Fourteenth Amendment.

Of particular interest are cases in which the government engaged in inequitable precondemnation activities that so trenched on the landowner's rights of use and enjoyment of his land as to work a non-physical taking, but then the governmental acquisition plans were abandoned before all of the involved property rights were destroyed. In such situations courts found a taking but awarded just compensation only for the temporary invasion of the owners' property rights. See *Washington Market Enterprises, Inc. v. City of Trenton*, 343 A.2d 408 (1975, N. J.), and *Jones v. People*, 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165 (1978).

Still other cases involved situations where the aggrieved landowners availed themselves of the remedy of invalidation of the confiscatory regulation, and after securing judgments to that effect, sued for just compensation to provide them with monetary redress for the temporary loss of use[35] of

[35]It is, of course, basic that the very idea of "property" rests on the notion that its owner has the right to use and enjoy it subject only to *reasonable* regulation (*Buchanan v. Warley*, 245 U.S. 60, 74 (1917)). Indeed, California defines property in terms of "ownership" which, in turn, is defined as ". . . the right of one or more persons to *possess and use* it to the exclusion of others," Cal. Civil Code §654, emphasis added. In that connection, please recall that for purposes of applying the protection of the Constitution to "property," this Court looks to state law's definition of "property"; see *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 279 (1943); *Sauer v. New York*, 206 U.S. 536, 548 (1907). For an extensive collection of federal cases applying this principle, see Annotation 1 A.L.R.Fed. 479, 482-483.

their property during the time consumed in obtaining a judicial declaration of the regulation's invalidity. See *Gordon v. City of Warren, supra*, 579 F.2d 386; *Sixth Camden Corp. v. Township of Evesham* 420 F.Supp. 709 (1976, D. N. J.); *Keystone Associates v. State*, 333 N.Y.S.2d 27, (1972, App. Div.) aff'd. 307 N.E.2d 254 (1973, N.Y.).

Finally, some courts have fashioned a flexible remedy whereby the regulation is found to work a taking, and thereupon the regulating entity is ordered either to allow the owner to proceed with his proposed land use or to initiate condemnation proceedings promptly. See *Estuary Properties, Inc. v. Askew*, ... So.2d .... (1979, Fla.App.). This approach too does not compel full acquisition of the "taken" property but rather confronts the regulating entity with an intelligent decision whether the public benefit to be derived from the community's asset enhancement warrants the cost. It is, in other words, a situation in which the courts quite properly present the bill for the illusory "free lunch", while its would-be consumer may opt out of the feast now that it is no longer "free".

In sum, the concept of non-physical takings, as any other takings, is premised on the sound and settled principle that a compensable taking may be found to exist but, even so, it need *not* be a *permanent* taking of the owner's *entire* "bundle of sticks." Depending on the specific facts and particularly on the nature and extent of the impact of governmental action on the subject property, it may only be a taking of a limited property interest, possibly for a limited period of time. In such cases the taking entity pays only for those rights it has taken, and only for the duration of the taking.[36]

[36]It cannot go without emphasis that the California Legislature contemplated this very possibility when in Cal. Gov't. Code §6953 it expressly authorized resales of land acquired for open space. It likewise cannot go without notice that Appellee's response to this point noted by Appellants (see Appellants' Brief, p. 42), is to ignore it entirely.

Most importantly, as this Court made quite clear in *Kaiser Aetna v. United States*, ... U.S. ...., 100 S.Ct. 383 (1979), a partial taking may result from the deprivation of the owner's one significant "stick" in the "bundle" of rights that comprise property.

Thus, any doomsday cries of impending municipal bankruptcy (which have made their appearance here in spite of the self-evident fact that any fiscal catastrophe so dramatically foreshadowed perforce has to be self-inflicted), ought to be viewed with the healthy skepticism they deserve.

For if a finding of a *full* taking is in the offing on a given set of facts, that perforce means that the constitutional violation has been gross and its impact on the owner devastating. Here, as in other areas of constitutional law, it seems only fitting that the courts opt for supporting the Constitution, and not waste their sympathy on its egregious violators. Here, as elsewhere, there is no such thing as a free lunch; there is no intellectually or morally respectable reason why the public whose amenities are being bettered and whose resources are being enhanced by quite deliberate and determined acquistive actions of the government[37] (see Sax, *Takings and Police Power*, 74 Yale L. Jour 26, 62-63 (1964)), should not be called upon to provide recompense to those who are being impoverished as a result of such

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[37]It cannot go without noting that in the case at bench the events complained of came about only after an extended period of studies by renowned experts who determined that the subject property was indispensable to the City's "open space" resources and recommended its acquisition; indeed, until the notion of a "free lunch" beckoned, the City's conduct was avowedly acquisitory and included formal eminent doman proceedings. *This* governmental entity—advised by its counsel all along—knew exactly what it was doing; it was *acquiring* "open space" parklands to enhance its own resources. An allusion to this Court's observation quoted *supra*, at p. 19, seems quite appropriate.

asset transfer.[38] This Court has repeatedly so held: *Gerlach Live Stock Co. v. U.S.*, 339 U.S. 725, 752-753 (1950); Armstrong v. U.S., 364 U.S. 40, 49 (1960); *Berman v. Parker*, 348 U.S. 26, 36, (1954). To countenance a contrary view would be to sanction the "shorter cut" than permitted by the Constitution, that was enduringly deplored by Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

5.

THE CASE AT BENCH PROVIDES AN OPPORTUNITY TO STRIKE A BALANCE BETWEEN THE PUBLIC INTEREST AND ENVIRONMENTALIST ZEALOTRY.

Particularly in juxtaposition with the currently fashionable rhetoric exhorting environmental concerns as being in the public interest, it warrants reiteration of the bedrock principle on which this society rests, that the public interest encompasses those values that the framers sought to protect by inclusion in the fundamental guarantees of the Constitution. Thus, this case may provide this Court with an appropriate vehicle for striking a balance between environmental zealotry and the constitutionally endorsed *public* interest in securing to individual citizens a measure of pro-

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[38]The reciprocity theory on which zoning is sometimes justified (*i.e.*, that a proper land use pattern confers benefits on all members of the community) manifestly has no applicability to cases such as this where one or two members of the community are stripped of their property in order to improve the lot of their fellows. To call that "reciprocity" is to engage in a certain degree of distortion of the English language. To put it in legal terms, the *Euclid* zoning notion on which the idea of reciprocity rests has it that land uses in the community are allocated and thereby balanced; but it is absurd to claim to find "balance" in a system that denies all economic use to one citizen in order to enhance the uses of his neighbors' land.

tection against overreaching governmental confiscatory course of conduct.

Simply put, this isn't 1960 or even 1970; Rachel Carson's plea for the environment is no longer a lone cry in the wilderness. Today's world must confront the fact that environmentalists - far from the embattled little band of yore - tend to make their appearance armed to the teeth with potent laws and regulations enforced by a formidable array of governmental bureaucracies. In short, environmentalism has come of age and like any other force in society it must confront its obligations and ethical duties. It is time to strike a balance, and this Court may quite appropriately do so in this case.

This case illustrates how an ordinary citizen, who lawfully accumulated some property, can be simply destroyed by latter-day environmentalist Savonarolas who care only for their ideological goals, and who care naught for simple fairness and its reflection in the Constitution. Such citizens deserve and are entitled to that Constitution's protection.

Conclusion.

Much of Appellee's argument is digressive. It presses on the Court a red herring having to do with the supposed horrors of damages being payable for any slight governmental misstep. That is simply not the issue here. The present allegations (which must be taken as true, this being a dismissal following a general demurrer) are that the subject property has been deprived of *all* utility and value; *that* is what is before the Court. Similarly, the issue is whether just compensation remains an appropriate remedy in cases of full deprivation of an owner's property rights; not some fantasy involving involuntary fee purchases for minor missteps.

Whatever may be the full panoply of criteria that will satisfy the scholars as a complete matrix of inverse condemnation law governing non-physical takings, this case presents three important factors:

(a) it charges deprivation of *all* utility and value.

(b) it charges that the ostensible regulation is in fact an acquisitory device, and

(c) it charges that the owners have been deprived by the interaction of all city acts of their substantial property rights.

The criteria laid down by this Court in *Penn Central* and *Kaiser Aetna* are thus quite sufficient to permit Appellants a trial on the merits.

Appellants pray that the judgment below be reversed and the cause be remanded for trial.

Respectfully submitted,

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